

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Adopted Rules of the  
Minnesota Board of Dentistry Relating to  
Limited General Dentists, Dentists, Dental  
Therapists, Dental Hygienists, and  
Licensed Dental Assistants, *Minnesota*  
*Rules*, Parts 3100.1130, 3100.1700,  
3100.1750, 3100.1850, 3100.0600,  
3100.5100, 3100.5300, 3100.7000,  
3100.8400, 3100.8500, and 3100.9600

**REPORT OF THE CHIEF  
ADMINISTRATIVE LAW JUDGE**

This matter came before the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.26, subd. 3. Based upon a review of the record in this proceeding, the Chief Administrative Law Judge hereby approves in all respects the Order on Review of Rules Under Minn. Stat § 14.26, of the Administrative Law Judge, dated .

In order to correct the defects enumerated by the Administrative Law Judge in the attached Report, the agency shall make changes to the rule to address the defects noted, or submit the rule to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations, for review under Minn. Stat. § 14.15, subd. 4.

If the agency chooses to make changes to correct the defects, it shall submit to the Chief Administrative Law Judge a copy of the rules as originally published in the State Register, the agency's order adopting the rules, and the rule showing the agency's changes. The Chief Administrative Law Judge will then make a determination as to whether the defect has been corrected and whether the modifications to the rules make them substantially different than originally proposed.

Dated: April 5, 2013

s/Raymond R. Krause  
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RAYMOND R. KRAUSE  
Chief Administrative Law Judge

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
  
FOR THE BOARD OF DENTISTRY

In the Matter of the Adopted Rules of  
the Minnesota Board of Dentistry  
Relating to Limited General Dentists,  
Dentists, Dental Therapists, Dental  
Hygienists, and Licensed Dental  
Assistants, *Minnesota Rules*, Parts  
3100.1130, 3100.1700, 3100.1750,  
3100.1850, 3100.3600, 3100.5100,  
3100.5300, 3100.7000, 3100.8400,  
3100.8500, and 3100.9600

**ORDER ON REVIEW OF  
RULES UNDER MINNESOTA  
STATUTES, SECTION 14.26**

The Minnesota Board of Dentistry (Board) is seeking review and approval of the above-entitled rules, which were adopted by the Board without a hearing. This review and approval is governed by Minn. Stat. § 14.26. On March 25, 2013, the Office of Administrative Hearings (OAH) received the documents that must be filed by the Board under Minn. Stat. § 14.26 and Minn. R. 1400.2310.

Based upon a review of the written submissions and filings, and for the reasons set out in the Memorandum which follows,

**IT IS HEREBY ORDERED** as follows:

1. The following rules or parts thereof are not approved:  
  
Minn. R. 3100.1130, Subpart 1, Item A; and  
Minn. R. 3100.1130, Subpart 3, Item H.
2. All other rules or parts thereof are approved.
3. Pursuant to Minn. Stat. § 14.26, subd. 3(b), and Minn. R. 1400.2300, subp. 6, the rules will be submitted to the Chief Administrative Law Judge for review.

Dated: April 5, 2013

s/Jeanne M. Cochran  
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JEANNE M. COCHRAN  
Administrative Law Judge

## MEMORANDUM

The Board has submitted these rules to the Administrative Law Judge (ALJ) for review under Minn. Stat. § 14.26. Subdivision 3(a) of that statute specifies that the ALJ must approve or disapprove the rules as to their legality and form. In conducting the review, the ALJ must consider the issue of whether the agency has the authority to adopt the rules; whether the record demonstrates a rational basis for the need for and reasonableness of the proposed rules; and whether the rules as modified are substantially different from the rules as originally proposed.

The rules of the Office of Administrative Hearings identify several types of circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge.<sup>1</sup> These circumstances include situations in which a rule exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by, its enabling statute or other applicable law; a rule was not adopted in compliance with procedural requirements, unless the Judge finds that the error was harmless in nature and should be disregarded; a rule is not rationally related to the agency's objectives or the agency has not demonstrated the need for and reasonableness of the rule; a rule is substantially different than the rule as originally proposed and the agency did not comply with required procedures; a rule is unconstitutional<sup>2</sup> or illegal; a rule improperly delegates the agency's powers to another entity; or the proposal does not fall within the statutory definition of a "rule."

These standards guide the determinations set forth below.

### I. Defects in the Proposed Rules

#### A. Minn. R. 3100.1130, Subp. 1, Item A – License to Practice Dentistry as a Limited General Dentist, Initial Requirements for Licensure

As proposed, Item A of Subpart 1 states, in relevant part:

The applicant shall provide documents *such as*:<sup>3</sup>

- (1) a completed board-approved evaluation of all international education;
- (2) an original or notarized copy of passing board-approved language testing within the previous two years;
- (3) an original affidavit of licensure;
- (4) a completed dental questionnaire;
- (5) a personal letter/curriculum vitae/resume;

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<sup>1</sup> Minn. R. 1400.2100 (2011).

<sup>2</sup> In order to be constitutional, a rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies. See *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980).

<sup>3</sup> Emphasis added.

- (6) an original or notarized copy of dental diploma and, if necessary, professional translation;
- (7) proof of clinical practice in dentistry;
- (8) an original or notarized copy of other credentials in dentistry and, if necessary, professional translation;
- (9) completed board-approved infection control training; and
- (10) an original or notarized copy of National Board Dental Examinations Report – Part I and Part II.

The use of the phrase “such as” in Item A renders the proposed rule impermissibly vague. A rule is impermissibly vague if it fails to provide sufficient standards for enforcement or is so indefinite that one must guess at its meaning.<sup>4</sup> The use of the phrase “*such as*” makes the proposed rule unclear as to whether each of the specific documents listed in Item A is required to be provided to the Board or whether the applicant has the option to do so. The use of the phrase “*such as*” also makes the rule unclear as to whether the list is exhaustive or whether the Board can request additional documentation from the applicant. The Statement of Need and Reasonableness (SONAR) specifies that the proposed rule is intended to require the filing of the documents listed.<sup>5</sup> To cure this defect in the proposed rule, the ALJ recommends that the second sentence in Item A be modified as follows: “The applicant shall provide the following documentation : . . .”

Due to the change suggested above, the ALJ also recommends one additional change to cure the defect. The ALJ recommends the Board modify the language in Item A(2) as follows: “an original or notarized copy of passing board-approved language testing within the previous two years *if English is not the applicant’s primary language*.”<sup>6</sup> While the SONAR indicates that the Board intended to require filing of the documents listed in Item A, presumably the filing of documentation of passing language testing would only be required for applicants for whom English is not their primary language.

**B. Minn. R. 3100.1130, Subpart 3, Item H – License to Practice Dentistry as a Limited General Dentist, Terms of Supervising Dentist**

As proposed, Item H of Subpart 3 states:

The supervising dentist must submit to the board *a written performance evaluation* of the limited license dentist in regards to employment including practicing clinical dentistry at least 1,100 hours annually, patient care, allied dental personnel, professionalism, billing practices, and make a

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<sup>4</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *In re N.P.*, 361 N.W.2d 386, 394 (Minn. 1985), *appeal dismissed*, 106 S. Ct. 375 (1985).

<sup>5</sup> Statement of Need and Reasonableness at 8 (October 31, 2012).

<sup>6</sup> Emphasis added.

*general recommendation within 90 days preceding to seven business days after completing the three consecutive years or any portion thereof.*<sup>7</sup>

The language “*within 90 days preceding to seven business days after completing the three consecutive years or any portion thereof*” is confusing and could be interpreted in different ways. This language is impermissibly vague as to the deadline for filing the written performance evaluation and general recommendation to the Board. Because a supervising dentist could be disciplined for failing to comply with the requirements of this proposed rule, it is critical that the Board clarify this language.<sup>8</sup>

To cure this defect in the proposed rule, the Administrative Law Judge recommends that the Board delete the language “*within 90 days preceding to seven business days after*” and instead establish a clear deadline of similar length for the filing of the required evaluation and recommendation. This change will eliminate the ambiguity that arises from the current language, which requires counting forwards and backwards to determine the applicable deadline. In addition, the ALJ recommends that the Board specify that the phrase “any portion thereof” means the portion of the three year practice period supervised by the reporting dentist. The ALJ suggests replacing the phrase “any portion thereof” with the following language: “any portion of the three year practice period.”

None of the recommended changes to the parts of the proposed rules that have been found to be defective would render the rule substantially different from the rule as initially proposed.

## **II. Technical Suggestions**

Assuming the Board takes the appropriate steps to correct the above defects, there are other language changes in the rules that the ALJ recommends be considered to clarify or improve the readability of the proposed rules. These wording changes are merely suggestions and do not denote defects in the proposed rules.

### **A. Minn. R. 3100.1130, Subp. 1 – License to Practice Dentistry as a Limited General Dentist, Initial Requirements for Licensure**

Minn. Stat. § 150A.06, subd. 9, provides that a “graduate of a nonaccredited dental program who successfully completes the clinical licensure examination, and meets all other applicant requirements of the board shall be licensed to practice general dentistry and granted a limited general dentist license by the board.” As proposed, Minn. R. 3100.1130, subp. 1, sets forth the requirements that an applicant must meet, including successfully completing the clinical licensure examination, to obtain a limited license to practice general dentistry in Minnesota. The proposed rule implies that the Board will grant a limited license to an applicant who meets all of the requirements, but does not expressly so state. To clarify that the Board will grant a limited license to

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<sup>7</sup> Emphasis added.

<sup>8</sup> See Minn. Stat. § 150A.08, subd. 1(13).

successful applicants, as provided in Minn. Stat. § 150A.06, subd. 9, the ALJ suggests that the Board add language stating: “The Board will grant a limited license to practice general dentistry in Minnesota to an applicant who successfully meets the requirements of Subpart 1.”

**B. Minn. R. 3100.1130, Subp. 1, Item E(4) – License to Practice Dentistry as a Limited General Dentist, Initial Requirements for Licensure**

As proposed, Minn. R. 3100.1130, subp. 1, Item E(4) provides, in relevant part, that: “The written agreement shall also include any practice limitations, and an acknowledgement that the applicant agrees to practice clinical dentistry at least 1,100 hours annually, *for a period of three consecutive years.*”<sup>9</sup> In the SONAR, the Board states that “the Board intends that the three-year time period would begin when clinical practice in Minnesota is initiated, not at the time the Limited General License is issued by the Board.”<sup>10</sup> To add clarity, the ALJ suggests that the language in Item E(4) be modified slightly to specify that the “three consecutive years” will be measured when clinical practice starts in Minnesota. The ALJ suggests changing the end of the sentence to read: “for a period of three consecutive years after clinical practice in Minnesota begins.”

None of the suggested modifications would make the rules substantially different from the rules as initially proposed.

**J. M. C.**

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<sup>9</sup> Emphasis added.

<sup>10</sup> SONAR at 9.